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SUPREME COURT OF THE UNITED STATES
October Term, 1990

COMMONWEALTH OF KENTUCKY — CROSS-PETITIONER

versus

VICTOR DEWAYNE TAYLOR — CROSS-RESPONDENT

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Respectfully submitted,

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QUESTIONS PRESENTED

I.

DOES THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT BAR CUMULATIVE PUNISHMENT FOR THE CAPITAL KIDNAPPING AND THE CAPITAL MURDER OF THE SAME VICTIM BY THE SAME DEFENDANT?

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No. 91-5975

SUPREME COURT OF THE UNITED STATES
October Term, 1990

COMMONWEALTH OF KENTUCKY — CROSS-PETITIONER

versus

VICTOR DEWAYNE TAYLOR — CROSS-RESPONDENT

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE
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Cross-Petitioner, the Commonwealth of Kentucky, respectfully urges the Court to grant certiorari for the following reasons:

OPINIONS BELOW

The reported opinions of the Supreme Court of Kentucky are reproduced in the appendix to the brief in opposition to petition for certiorari. The Kentucky Supreme Court opinion in Cosby v. Commonwealth, Ky., 776 S.W.2d 367 (1989), cited in the opinion below, is also reproduced in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a). On September 6, 1990 the Kentucky Supreme Court affirmed the Cross-Respondent's convictions and sentences. (A 1-12). On July 3, 1991 a petition for rehearing was denied in part and granted in part. (A 13-38).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

INTRODUCTION

This is a death penalty case in which Kentucky seeks certiorari review of its state Supreme Court's ruling that the double jeopardy clause of the Fifth Amendment bars cumulative punishment for the capital kidnapping and

capital murder of the same victim by the same defendant.

STATEMENT OF THE CASE

The facts of the case are set forth at pages 2-11 of Kentucky's brief in opposition to the petition for certiorari. Brief facts relating to the one issue in this cross-petition are set forth below.

Victor Taylor, cross-respondent, and co-defendant George Wade were charged with the murder, kidnapping and robbery of two high school students, Richard Stephenson and Scott Nelson. Wade was tried separately and found guilty of two counts each of murder, kidnapping and first-degree robbery. He was acquitted of sodomy. Wade received sentences of fifteen (15) years on the robbery, twenty-two (22) years on the kidnapping and life on the two murders. All sentences were run concurrently and Wade was sentenced to a total of life imprisonment. (TR 49 7171-7264; TR 50 7270-7273, 7304-7333).

Cross-Respondent was convicted of two counts each of murder, kidnapping and first-degree

robbery, and one count of first-degree sodomy. (TR 51 7536-7537; TE 4/26/86 7-9). Cross-Respondent received sentences of death on the murder and kidnapping convictions and three consecutive twenty (20) year terms of imprisonment for the robbery and sodomy convictions. (TR 51 7541-7544; TE 4/28/86 190-194).

On direct appeal Cross-Respondent argued that convictions and punishment for both capital kidnapping and murder violated double jeopardy prohibitions (Cross-Respondent's state court brief 38-40). Cross-Respondent's brief argued there was no double jeopardy violation. (Cross-Respondent's state court brief, 43-45). In an opinion rendered September 6, 1990 the Kentucky Supreme Court did not rule on this issue. The opinion was unanimous except for one abstension by Justice Leibson. (Appendix to Brief in Opposition to Petition for Certiorari hereinafter "A" 1-12). Cross-Respondent petitioned for a rehearing and modification of that opinion, again asserting the double

jeopardy violation among the other allegations raised. In an opinion rendered September 6, 1990, the Kentucky Supreme Court granted the petition for rehearing in part and for modification in part. On the double jeopardy issue the court held "murder and kidnapping merge at the enhancement stage." (A 23, quoting Cosby v. Commonwealth, Ky., 776 S.W.2d 367, 373 (1989)). Therefore, Cross-Respondent could not be sentenced to death for kidnapping his murder victims, or for murdering his kidnapping victims. Thus, Cross-Respondent's death sentences on the two (2) kidnapping convictions were vacated and the death penalty remained for only the two (2) murder convictions. (A 24).

REASONS FOR GRANTING THE CROSS-PETITION FOR WRIT OF CERTIORARI

I.

THE KENTUCKY SUPREME COURT MISINTERPRETED AND MISAPPLIED THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE AS PRECLUDING PUNISHMENT FOR CAPITAL KIDNAPPING AND CAPITAL MURDER.

The Kentucky Supreme Court interpreted the Double Jeopardy Clause of the Fifth Amendment to

preclude Cross-Respondent's death sentence for both murder and kidnapping. The court held "murder and kidnapping merge at the enhancement stage." (A 23, quoting Cosby v. Commonwealth, Ky., 776 S.W.2d 367 (1989). The Kentucky Supreme Court has misinterpreted and misapplied the Fifth Amendment Double Jeopardy Clause which provides:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

U.S. Constitution, Amendment 5; See Benton v. Maryland, 395 U.S. 784 (1969) (Double Jeopardy Clause applicable to states by the Fourteenth Amendment)

Kentucky's kidnapping statute, KRS 509.040, provides:

> (1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
>
> (a) To hold him for ransom or reward; or
>
> (b) To accomplish or advance the commission of a felony; or
>
> (c) To inflict bodily injury or to terrorize the victim or another; or
>
> (d) To interfere with the performance of a governmental or political function; or

(e) To use him as a shield or hostage.

The intent required to be proven under this language is the intent to commit (a) through (e). Kidnapping becomes a capital offense when:

> The victim is not released alive or when the victim is released alive but subsequently dies as a result of:
>
> (a) Serious physical injuries suffered during the kidnapping; or
>
> (b) Not being released in a safe place; or
>
> (c) Being released in any circumstances which are intended, known or should have been known to cause or lead to the victim's death.

A person is guilty of murder in Kentucky when "with intent to cause the death of another person, he causes the death of such person or of a third person . . . ." "Murder is a capital offense." KRS 507.020.

Contrary to the Kentucky Supreme Court's opinion, murder and kidnapping are separate and distinct crimes. The Kentucky legislature created separate statutes and separately defined the crimes of murder and kidnapping. It is

evident from the language that the legislature intended to create separate and distinct offenses. For example, the legislative Commentary to the kidnapping statute expressly states:

> We have designed the penalty provision with a view to saving the victim's life and assuring his safe return to his normal abode. We therefore provide an incentive to the kidnapper to release his victim alive, substantially unharmed, and in a safe place prior trial by making him guilty of a Class B felony if he does voluntarily release him but of a Class A felony [capital offense] if he does not. If the release is not voluntary, the accused will not get the benefit thereof. Proposed Delaware Criminal Code §452, Commentary (1967).

KRS 509.040, Commentary (1974)

There is no violation of the due process clause for imposing sentences for each of these crimes. The Kentucky Supreme Court incorrectly held punishment for these two offenses to violate the double jeopardy clause. The court's decision directly conflicts with what this court has held. In Williams v. Oklahoma , 358 U.S. 576 (1959), this Court reviewed whether the imposition of the death penalty in a kidnapping

prosecution violated the Due Process Clause. The defendant had already been convicted for the murder in a separate trial. This Court specifically found:

> [K]kidnapping is a separate crime, entirely distinct from the crime of murder. The Court's consideration of the murder as a circumstance involved in the kidnapping crime cannot be said to have resulted in punishing petitioner a second time for the same offense, nor have to denied him due process of law in violation of the Fourteenth Amendment.

Id., 358 U.S. at 586. See e.g., Stephens v. Zant, 631 F.2d 397, 401 (5th Cir. 1981), modified 648 F.2d 446 (5th Cir. 1981), overruled on other grounds, Zant v. Stephens, 462 U.S. 862 (1983) (murder and kidnapping with bodily injury have separate and distinct elements requiring proof of different facts and therefore are not the same offense under the Blockburger analysis); Pryor v. State, 238 Ga. 698, 234 S.E.2d 918 (1977) (murder and kidnapping contain different elements and therefore murder is not included within kidnapping with bodily injury).

Additionally, this Court has made clear that application of the double jeopardy clause with respect to cumulative sentences does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, 450 U.S. 333 (1981). The Kentucky Supreme Court has used the wrong analysis for deciding the double jeopardy issue in this case.

The double jeopardy clause prohibition against multiple punishment for the same offense cannot be resolved without determining what punishment the legislature has authorized. Whalen v. United States, 445 U.S. 684, 688 (1980). The dispositive issue is whether the legislature intended to authorize separate punishments for two crimes. Id., 445 U.S. at 689. In Brown v. Ohio, 432 U.S. 161, 165 (1977) this Court held:

> [W]here consecutive sentences are imposed at a single criminal trial, the role of the Constitutional guarantee is limited to assuring that the Court does not exceed its legislative

> authorization by imposing multiple punishments for the same offense.

As summarized in Albernaz, 450 U.S. at 344, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." Where the legislative intent is to impose multiple punishment the imposition of such punishment does not violate prohibitions against double jeopardy. Id., 450 U.S. at 344. This Court's decision in Hunter, supra, 459 U.S. at 364 clarifies the issue in the case at bar:

> Accordingly, where, as here, a Legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the 'same' conduct under Blockburger, [284 U.S. 299 (1932)] a court's task of statutory construction is at an end and the prosecution may seek and a trial court or jury may impose cumulative punishment under the statutes in a single trial.

By contradicting this Court's previous holdings on double jeopardy, the Kentucky Supreme Court has circumvented the legislature's authority to impose cumulative punishment. The

Kentucky court's opinion renders the legislative intent to provide an incentive for the defendant to release the kidnap victim alive null and void. See Commentary to KRS 509.040, supra. Cross-Respondent was given more lenient treatment than what the legistature contemplated

CONCLUSION

Therefore, this Court should grant certiorari to correct the Kentucky Supreme Court's misapplication of the double jeopardy clause. Granting certiorari would also clarify application of the double jeopardy clause for other state supreme courts.

Respectfully submitted,

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